BACKGROUND PAPER NO. 2

THE CONCEPT AND NATURE OF ABORIGINAL RIGHTS: AN OVERVIEW

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PREFACE

"The Concept and Nature of Aboriginal Rights: An Overview" is the second in a series of background papers which are being made available by the Alberta Native Affairs Secretariat. This series of papers is intended to provide useful background information to the reader with an interest in aboriginal matters.

The current process of First Ministers' Conferences on aboriginal constitution matters, provided for in Section 37 on the Constitution Act, 1982, is addressing the task of giving further definition to the concept of aboriginal rights. To a large extent, the dilemma confronting the First Ministers' process is one of reconciling two very different views of the concept and nature of aboriginal rights.

The purpose of this particular background paper is to provide an overview of the concept of aboriginal rights both as it has historically evolved within the context of European legal principles and as it has been given expression by the aboriginal political organizations. It is hoped that this overview will be of assistance to the reader by providing a context within which to place the ongoing events related to the national constitution discussions.

Although the background paper contains considerable reference to case law, it should not in any way be interpreted as a legal opinion. In addition, it should be noted that views summarized in this paper do not necessary reflect the position of the Government of Alberta. The Native Affairs Secretariat would, however, welcome any comment by interested readers.

EXECUTIVE SUMMARY

As the original occupants of Canada, Native people have claimed certain rights which arose prior to and continued to exist after the conquest and settlement of the North American continent by the Europeans. These aboriginal rights are inextricably linked with the Native land base and, from the viewpoint of Native people, encompass the major aspects of the aboriginal lifestyle.

Europeans, however, focused mainly on the issue of property rights as between the aboriginal population and the sovereign who asserted title to the lands of North America based on the principle of discovery. By applying European principles of property law and land tenure which arose in the European experience of effective use of limited resources, colonial representatives of the new sovereign sought to achieve the orderly and expedient settlement of the lands occupied by Indians. Dealings with the Indians were to be carried out in a fair and equitable manner as prescribed by both secular and religious powers.

In Canadian law, there are two sources of Indian title that have been recognized. The common law of the United States had recognized that aboriginal rights inure to Native peoples by virtue of their occupation of certain lands at the time Britain asserted sovereignty over them. While some Canadian judges have adopted this view, Indian title is also seen as arising under the

provisions of the Royal Proclamation of 1763, in areas where the Proclamation applies.

An alternate basis for aboriginal title is often asserted by Indians as rights to ownership of lands traditionally occupied by their tribe by virtue of prior occupation and rightful inheritance from their forefathers. According to this view, included in the terms "aboriginal rights", "aboriginal title", "Native rights", "Native title", and "Indian title" is a particular form of property inuring to Native peoples by virtue of their occupation of the lands of North America from time immemorial. Proponents of this view maintain that the basis of aboriginal rights was a general respect for priority of habitation as well as an early appreciation by European discoverers of the accommodations to be made in ensuring their property on the North American continent.

The purpose of this paper is to provide a background to the issue of aboriginal rights in light of the continuing constitutional discussions between representatives of the federal and provincial governments and national Native organizations. The paper includes: (1) an outline of the development of the common law doctrine of aboriginal rights in American and Canadian case law; (2) a discussion of the main provisions of the Royal Proclamation of 1763; (3) the requirements of establishing aboriginal title at common law; (4) an examination of the nature of aboriginal rights; and (5) an outline of the Indian perspective on aboriginal rights.

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A. THE DOCTRINE OF ABORIGINAL RIGHTS AT COMMON LAW

1. American Case Law

The doctrine of aboriginal rights was first formulated in 1823 by Chief Justice Marshall of the United States Supreme Court in the case of Johnson and Graham's Lessee v. M'Intosh. [1]. His conclusions regarding the principles of aboriginal title are based on an historical analysis of the exploration and settlement of the American continent. The policy and practice followed by British and American authorities in their associations with the Indians is interpreted as recognition of an aboriginal title vested in the Native inhabitants.

Chief Justice Marshall's ruling laid the theoretical foundations for future judicial attitudes towards aboriginal rights. He traced title to colonial lands to the discovery of North America by the Europeans. In order to avoid hostilities over conflicting claims to new territories, the nations of Europe had to establish some guiding principle which all would acknowledge as deciding their respective rights to the newly discovered lands. Competing Europeans devised a principle whereby an act of discovery

> "gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." [2]

The central characteristics of aboriginal title -- limited alienability and a vulnerability to extinguishment independent of alienation -- followed naturally from the legal implications of discovery. The discovering nation had the exclusive right of acquiring the soil from the Native peoples but this did not "affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man." [3]

"Title" as defined by the discovery principle was analogous to the concept in international law known as a "sphere of influence" which gave to its holder a "right of presumption" as against other nations. The Native presence, however, constituted no challenge in international law because it lacked the political and territorial elements central to the European concept of sovereignty.

The basic elements of every institution of property are scarcity and labour. [4] European concepts of individual property rights and estates had been developed to regulate the acquisition of finite resources in an increasingly crowded civilization. The skill and labour initially expended to make land habitable and productive was an important indicator of the existence of property rights. However, the Native way of life made it inappropriate to enforce individual rights of exclusion in a protected parcel of land as subsistence was "drawn chiefly from the forest". [5]

Therefore, when the Europeans used the concepts of scarcity and labour as tests to determine whether the Natives conceived of "property" at all, North America was regarded as "legally unoccupied".

The exclusive relationship created between discoverer and discovered gave the former the sole right to acquire land from the latter. Chief Justice Marshall in Johnson v. M'Intosh referred to this right to acquire as the "absolute ultimate title" which diminished the sovereign right of independent Native nations by denying their right to dispose of their land to anyone of their choosing. A formal acquisition by the United States directly from an Indian nation was the sole means by which jurisdiction over Native lands could be legally transferred. Only when the Native right to occupy land was combined with the government's exclusive right to acquire it could grants made to individuals afterwards be protected in court. By characterizing the definition of Indian title in terms of European land acquisition policy and by defining the title as one which could be given by Indians and received by private individuals, and was sustainable in court, Chief Justice Marshall indicated his awareness of the central role of the government in orderly westward expansion.

To expedite the process of western settlement without having to rely on the combination of the sovereign's "absolute ultimate title" and the "Indian title of occupancy", the

right of acquisition given by discovery was treated as a "title" which could be conveyed to grantees and upheld in courts without regard to purchase or cession of the "Indian title" to the sovereign. The discovery principle gave "an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise." [6]

The basic principles of the doctrine of discovery as developed by Chief Justice Marshall in Johnson v. M'Intosh and reiterated in 1832 in the subsequent case of Worcester v. Georgia, were that Indians still had certain rights in the lands they occupied but the Crown could extinguish these rights and the Indians could not alienate these rights to anyone other than the Crown.

2. Canadian Case Law

Although the decisions in Johnson v. M'Intosh and Worcester v. Georgia are American, the doctrine of discovery is not exclusively an American concept but applies generally to North America. In St. Catharine's Milling and Lumber Co. v. The Queen, [7] an 1887 decision, which is widely regarded as the starting point for any Canadian inquiry into the nature of aboriginal title, Strong, J., of the Supreme Court of Canada commented that American law respecting aboriginal title is relevant in Canada because the law in both countries is the result of colonial policy which was uniform

throughout British North America before the American Revolution in 1775. British colonial policy in dealing with Indian lands in British North America continued to recognize that:

> "Under British law, the Crown, upon acquiring an American territory, was generally free to modify or abrogate any existing private land rights, including those held by Indians, as an act of state incidental to the acquisition. This principle has been held applicable to British overseas dominions generally, whatever their precise mode of acquisition, be it conquest, cession or settlement.....
> However, in the absence of confiscatory acts performed in the course of acquisition or other relevant evidence of the Crown's intent, it is presumed as a matter of British law, that rights of private property have been respected by the Crown and continue to exist under the new regime. This presumption.....is applicable to all sorts of acquisitions, and all types of local inhabitants, whatever their racial origins, culture, religion or way of life." [8]

The Supreme Court of Canada in St. Catharine's Milling had not expressed a clear majority opinion on the issue of the source of Indian title. Ritchie and Fournier JJ. acknowledged that Indians had legal rights but did not discuss the source. Henry and Taschereau JJ. recognized Indian title as merely an equitable claim arising from the policy of the Crown to treat with Indians in order to facilitate settlement. [9] Strong J. was of the opinion that it was this policy which amounted to an unwritten common law which the courts should enforce. Gwynne J., however, recognized that Indian title arises from a source predating the Royal Proclamation.

On appeal to the Judicial Committee of the Privy Council in 1888, the court in St. Catharine's Milling and Lumber held that the "tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign" [10] and "that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished." [11] The Privy Council did not, however, indicate if the aboriginal title might arise independently of the Royal Proclamation of 1763 which had reserved central and western regions of Canada as "Indian Country."

The issue of the source and content of aboriginal rights arose in the case of Calder et al. v. Attorney-General of British Columbia. [12] The Nishga tribe of British Columbia had occupied its traditional homelands in the northwestern part of the province without interruption. Its members had never entered into a treaty with the Crown and the bulk of the lands on which they lived had never been alienated. In 1969 the Nishgas brought suit for a declaration that their aboriginal title to the land had never been lawfully extinguished.

Having failed to secure a declaration of their aboriginal title to the lands in the British Columbia Supreme Court and Court of Appeal, the Nishgas appealed to the Supreme Court of Canada. The appeal was dismissed although no majority

opinion emerged on the issue of the existence of aboriginal rights. In Hall, J.'s minority opinion, he indicated that the issue was not the exact nature and extent of aboriginal rights, but rather was:

> "....whether any right or title the Indians possess as occupants of the land from time immemorial has been extinguished....This is not a claim to a title in fee but is in the nature of an equitable title or interest....., a usufructuary right and a right to occupy the lands....which does not in any way deny the Crown's paramount title...The essence of the action is that such rights as the Nishgas possessed in 1858 [the date of the first colonial land law] continue to this date. Accordingly, the declaratory judgment asked for implies that the status quo continues and this means that if the right is to be extinguished it must be done by specific legislation in accordance with the law. [13]

Hall, J. issued the declaration without inquiring into the precise nature of aboriginal rights. He reasoned that the Nishgas were entitled to a declaration that their right of aboriginal occupancy was unextinguished simply because the fact of aboriginal occupancy was unextinguished. [14]

It would appear from a review of the leading authorities that aboriginal title may arise not by a grant from the Crown, as does all title according to English real property law, but by operation of the presumption of continuity of the property rights of inhabitants by virtue of their possession of lands at the time of their discovery by Britain.

B. ROYAL PROCLAMATION OF 1763 (R.S.C. 1970)

The second recognized source of Indian title is the Royal Proclamation issued by the British Crown in 1763 following the acquisition of former French and Spanish territories in North America. There has also been the view expressed that the Royal Proclamation creates the rights of Indian people rather than merely promoting and clarifying pre-existing and conceded rights.

Frequently termed the "Charter of Indian Rights", the Proclamation dealt with several matters relating to the administration of Britain's new colonies and attempted to end the increasing hostilities over encroachments on Indian lands. The Proclamation "reserved" a large area of land outside the borders of the colonies and which had not yet been purchased by or ceded to the Crown, to the Indians as their hunting grounds. [15] The eastern boundaries of "Indian country" are indicated in the text of the Proclamation as that area bounded by the limits of the three new colonies of Quebec, East and West Florida and the Hudson's Bay Company lands as well as the Atlantic watershed. [16] However, the text is silent as to the western boundary of the reserved area which has resulted in several cases holding that the Proclamation does not apply to the far North or West, such lands being terra incognita in 1763. [17]

Within the colonies, the basic causes of friction with the Indians were fraudulent purchases of Indian lands by whites. In response to this problem, the Proclamation prohibited the governors of all the British colonies from granting any unceded lands within the boundaries of their colonies until such lands had been properly purchased from the Indians. The British policy of the state's role in land acquisition stipulated that: (1) no one except the representative of the sovereign is authorized to purchase aboriginal lands; (2) the formalization of the transfer must be made by an authorized representative of the aboriginal group; (3) the transfer must take place at a public meeting attended by other members of the aboriginal group; and (4) the Indians' possession of unceded or unpurchased lands must be undisturbed. [18] It is clear, then, that the Royal Proclamation acknowledges that the aboriginal peoples who occupy and use unceded or unpurchased lands have an interest that is obtainable through cession or purchase.

It should be noted that other constitutional documents and legislation have included provisions concerning aboriginal territorial rights, usually by requiring compensation for their extinguishment. In addition to the Royal Proclamation, these documents include the Manitoba Act, 1870, [19] the Rupert's Land and North-Western Territory Order, 1870, [20] the Dominion Lands Act of 1870, [21] and the Ontario and Quebec Extension Acts of 1912. [22]

C. REQUIREMENTS OF ESTABLISHING ABORIGINAL TITLE

Basic to the determination of the existence of aboriginal title based on either the common law or the Royal Proclamation is possession and occupancy of the land. The doctrine of aboriginal rights as a common law concept is based on occupation of the land at the time sovereignty was asserted by England. The Royal Proclamation reserves only unceded lands which in 1763 were in the possession of the "several Nations or Tribes of Indians with whom we are connected, and who live under our protection." [23]

To establish an aboriginal title at common law, four essential elements must be proved:

(1) that the aboriginal people and their ancestors were members of an organized society;
(2) that this society occupied the specific territory claimed;
(3) that this territory was occupied to the exclusion of other organized societies; and
(4) that the occupation of the lands claimed was an established fact at the time sovereignty was asserted by England.

These elements were set out by Mr. Justice Mahoney of the Federal Court in Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development. [24] The court held that

"the nature, extent or degree of the (Inuit's) physical presence on the land they occupied...is to be determined in each case by a subjective test". The Inuit of Baker Lake satisfied this requirement by proof of occupation of the lands claimed "to the extent human beings were capable of surviving on the barren lands". [25]

The Baker Lake case is the leading Canadian decision which deals explicitly with the requirements of establishing aboriginal title. Although it is unclear how strictly these requirements should be applied, it appears that occupancy of the area would at least be required since this is the basis upon which aboriginal title is recognized at common law.

The United States Court of Claims has also adopted various requirements of occupation for the establishment of aboriginal title: actual, exclusive, continuous use and occupancy for a long time prior to the loss of property. The degree of occupancy required was considered by that court in United States v. Seminole Indians. [26] The question was whether the undoubted exclusive possession by the Seminoles of the Florida peninsula was of a sufficient extent to support the recognition of an aboriginal claim. The court concluded that since the Seminoles had exclusive control of the area, "use and occupancy" did not require actual possession. "Use and occupancy" could be established by hunting, trapping and food gathering and by maintaining temporary encampments throughout large areas of land. [27]

The court concluded that the "key to Indian title lies in evaluating the manner of land use over a period of time. Physical control or dominion over the land is the...criterion." [28] American courts have also required that this occupancy be for a length of time sufficient to "transform the area into domestic territory." [29] Canadian courts have indicated that occupancy sufficient enough to establish aboriginal possession is a question of fact to be determined on the basis of archaelogical, anthropological and historical data. [30]

D. NATURE OF ABORIGINAL TITLE - DETERMINATION OF PROPERTY RIGHTS

Initially, it would seem that whatever rights aboriginal title includes, these rights vest in the group as a whole rather than in an individual member. Aboriginal title has been judicially referred to as a "communal usufructuary occupation" [31] and as having a "right of occupancy attached to the Indians in their tribal character." [32]

That a right of occupancy is an element of aboriginal title seems clearly established at common law:

> "It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned...The absolute ultimate title has been considered as acquired by discovery subject only to the Indian title of occupancy...such a right is no more incompatible with a seisin in fee, than a lease for years and might as effectively bar ejectment." [33]

> "...an aboriginal title to that territory carrying with it the right freely to move about...vested at common law in the Inuit." [34]

> "I think the Crown owns the soil of all unpatented lands, the Indians possessing only the right of occupancy." [35]

What rights, aside from the basic right to occupancy, an Indian group establishing aboriginal title has in the land has not been clearly defined by the courts. Aboriginal title is often described as a usufructuary right. The Privy Council in St. Catharine's Milling stated that aboriginal title was "a personal and usufructuary right." [36] Mr. Justice Hall in Calder described the right being asserted by the Nishgas as:

> "...an equitable title or interest..., a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title..." [37]

But what is unclear is what is meant by a usufructuary right. This right has been defined as:

> "The right of enjoying a thing, the property of which is vested in another and to draw from the same all profit, utility and advantage which it may produce provided it be without altering the substance of the thing." [38]

Although this definition implies that the usufructuary owner was limited to using renewable resources, there are two possible uses of the term:

(1) the term "usufructuary right" is used only as an analogy and aboriginal title gives an unlimited right to use the land; or

(2) aboriginal title includes the rights to hunt, fish and gather as these were the uses traditionally made of the land by the Indians.

Similarities can be seen between Indian concepts of land rights and usufructuary rights but nevertheless, the difficulty of applying European legal concepts to land rights derived from traditional occupation and use of aboriginal lands is clearly recognized. The communal right of a tribe to a defined territory was seen as exclusive to that group by neighbouring tribes, just as a usufructuary right is exclusive to its holder. Further, the inalienable nature of a usufruct is consistent with the recognized nature of aboriginal title, whether derived from aboriginal possession or from the Royal Proclamation.

One difficulty in applying the usufruct analogy to Indian title was pointed out in Amodu Tijani v. The Secretary, Southern Nigeria, [39] by the Privy Council. Rather than being an individual right, a usufructuary right or, "the (Indian) title...may be that of the community." [40] Mr. Justice Judson

of the Supreme Court of Canada in Calder also noted the difficulties involved in applying the usufruct concept to Indian title. He described Indian title as:

> "[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help...to call it a "personal or usufructuary right." [41]

The Calder case has been interpreted as recognizing that the content of aboriginal title depends on the factual examination of the property concepts of the native group involved. This aspect was also clearly noted by Chief Justice Marshall in Johnson v. M'Intosh where he envisioned the survival of Indian laws and land tenure systems within tribal territories even after the assertion of sovereignty by the British Crown. [42]

Further, it is possible to conclude from the decision in Attorney-General Quebec v. Attorney-General Canada [43] (the Star Chrome case) that the court, when it referred to aboriginal title as a usufructuary right, was only referring to the limitations on alienation created by the doctrine of discovery, not the uses to which the land could be put. In the Star Chrome case, Duff, J., stated that the Indians' right was a "usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown." [44]

Some of the debate concerning the nature of Indian title may have been clarified by the recent Supreme Court of Canada decision in Guerin et al. v. The Queen. [45] The majority in that case went beyond the principles enunciated in the Calder v. Attorney General of B.C. case which recognized the existence of aboriginal title as a legal right which derives from the Indians' historic occupation and possession of their tribal lands. In Guerin, the majority made clear that the aboriginal title exists independently of the Royal Proclamation of 1763 and does not owe its existence to creation by legislative or executive provisions. [46]

The majority also addressed the issue of the nature of aboriginal title and stated that descriptions such as "personal and usufructury" or "beneficial" are only analogies and are not very useful in describing the "unique interest" of Indian title. [47] The nature of the Indian's interest can best be described by the fact that it could not be alienated except to the federal crown and by the fact that the federal crown is under an obligation to deal with the surrendered land in the Indians' best interest. [48] Although the majority declined to describe the "unique interest of Indian title" in any greater detail, it did manage to say that ... "any description of Indian title which goes beyond these two features is unnecessary and potentially misleading." [49]

Whatever the nature of aboriginal rights, the courts seem willing to allow the integration of native concepts of property rights into the British land tenure system if the native concepts are sufficiently precise to be recognized and enforced on their own terms. Courts have recognized the communal land rights of Indians, whether described as a "right of occupancy" or a usufructuary right, to give Indians a legal right to retain possession of their lands and to use them according to their own internal concepts of property rights. [50]

E. THE ABORIGINAL CONCEPT OF ABORIGINAL RIGHTS

Aboriginal groups maintain that they have special rights which inure to them by virtue of their original occupation of the North American continent. These aboriginal rights include: (1) property rights (i.e., title to unceded lands); (2) rights to hunt, fish, and trap on traditional lands; and (3) political rights (i.e., the right to self-government).

Native people who have attempted to assert their aboriginal rights in the courts have encountered a body of case law which contained almost no description of what aboriginal title may contain. Instead, the political and property

rights of Europeans on the North American continent were used to limit the description of aboriginal title. The justification for this was the objective of systematic acquisition, settlement and development of the continent, in which orderly colonization was to be accomplished through the framework of European property law. 51

The current position of aboriginal nations on their rights was stated by the Assembly of First Nations, the Native Council of Canada, the Metis National Council and the Inuit Committee on National Issues at the First Ministers' Conference of Aboriginal Rights held in March, 1983. In general, a consensus can be identified among these groups on the definition of aboriginal rights. This consensus is represented in the draft proposal to amend the constitution presented by National Chief David Ahenakew on behalf of the Assembly of First Nations. The draft included provisions to guarantee autonomous cultural and economic status for aboriginal peoples, to protect historically acquired lands and to entrench the following political rights:

1. The right of the First Nations to their own self-identity, including the right to determine their own citizenship and forms of government;
2. The right to determine their own institutions;
3. The right of their governments to make laws and to govern their members and the affairs of their people...;

> 4. ...Their right to exemption from any direct taxation levied by other governments;
>
> 5. The right to move freely within their traditional lands regardless of territorial, provincial, or international boundaries. [52]

This statement by Mr. Ahenakew, and statements by other aboriginal representatives presented at the Conference, [53] takes the view that the acknowledged principle aspect of aboriginal rights relates to political jurisdiction that includes a land base.

Further, there is a consensus view among the aboriginal organizations regarding the source from which these rights flow: aboriginal rights are founded on the fact of "original" sovereignty -- prior occupation of Canada by aboriginal populations. They are seen as part of the package of rights which the tribes had before European colonization. This package of rights includes: (1) the recognition of aboriginal self-government; (2) the recognition of customary aboriginal law; (3) the recognition of aboriginal land rights; and (4) the recognition of land-based rights, such as those of hunting, fishing and trapping. The aboriginal groups regard ownership of the land as the fundamental concept upon which other rights, including the right to self-government, are based.

The continuing existence of those rights that are founded on original sovereignty have not, according to the aboriginal

In terms of international law, these assertions and statements by aboriginal spokespersons may be analogized to the situation of colonialism in which non-European people came under European rule. Despite the emergence of a new sovereign and immigration, the rights of the indigenous people, and in particular their sovereign rights, may not be completely extinguished, at least in principle, even by an overt act of the new sovereign. [54] This concept has been labelled "self-determination" or the "recognition of the right of all people to rule themselves" by the world community and is similar to the position implied by the term "aboriginal rights" when used by the aboriginal organizations in Canada.

Although Canada's indigenous population asserts their right to self-determination through the recognition of aboriginal rights, they advocate this recognition within the context of Confederation. Native organizations differ with respect to the specific method of attaining their right to self-determination but they appear to agree on two points:

(1) resolving their right to self-determination is limited to ensuring that the aboriginal peoples continue to survive and develop as distinct nations; and

(2) this necessitates a restructuring of the Canadian political system to guarantee aboriginal people the exclusive legislative authority deemed essential to their survival and development as a distinct people. [55]

In the view of the aboriginal organizations, achieving this objective will require the establishment of native jurisdiction over aboriginal lands and over matters which directly affect the economic, linguistic, cultural and educational aspects of the native lifestyle. Although the proposed solution is the creation of institutions of responsible self-government, the national Native organizations are not necessarily in agreement as to the form the institutions should take. The Assembly of First Nations has suggested the replacement of the binary division of powers between federal and provincial levels with a tripartite set of jurisdictions. In addition to federal and provincial areas of power, a third area called "Indian governments," would be responsible for matters directly concerned with the survival and development of the aboriginal population. There would be, however, no alteration of the current balance of power between federal and provincial governments.

On the other hand, the Native Council of Canada and the Metis National Council both advocate the establishment of institutions of native self-government and a change in the present federal and provincial instruments of government. The proposed change would involve the guaranteed inclusion of a number of seats in Parliament and the Legislatures reserved exclusively for the descendants of the aboriginal peoples. Regarding the institutions of self-government, the proposals are not entirely clear whether Native jurisdiction would create a third level of government, as the Assembly of First Nations has proposed, or whether their jurisdictional authority would be subordinate to the existing levels of Government.

Although these proposals differ in form, the fundamental philosophy is similar. All three native organizations advocate changes within the Canadian political structure to ensure the autonomous existence of the aboriginal entity. The differences that exist relate only to the degree that aboriginal self-government should be recognized within the context of Confederation.

F. SUMMARY AND CONCLUSIONS

To determine the nature of aboriginal rights in Canada, one must examine the source from which they arise. Canadian law has given some recognition to aboriginal rights, most commonly in the area of land rights. The common law recognizes that the rights of Native people arise by virtue of their occupation of the land at the time British sovereignty was asserted over them. The Royal Proclamation of 1763 recognized Indian land rights, although the exact geographical application of the Proclamation has never been authoritatively settled. Provisions in the Rupert's Land and North-Western Territory Order of 1870 and in the Quebec and Ontario Boundary Extension Acts of 1912 recognized Indian land rights to the extent of requiring compensation or treaties.

Native leaders have asserted the rights of Canada's aboriginal peoples to the ownership of traditionally occupied lands by virtue of occupation since time immemorial. The Indian perspective views ownership of the land as the fundamental concept on which other rights, including the right of self-government, are based. Although a recognition of aboriginal rights as viewed from the Indian perspective could involve the recognition of aboriginal self-government, customary aboriginal law, land rights and

land-based rights such as rights to hunt, fish, and trap, aboriginal rights have tended to be seen in Canada only in terms of land and land-based rights.

In an effort to guarantee the distinct cultural identity of native people, to protect historically acquired lands and to entrench political rights, draft proposals to amend Canada's Constitution have been presented by national Native organizations to government representatives at Constitutional Conferences. These proposals, though different in form, are based on a fundamental philosophy. The proposed changes to Canada's political structure intended to ensure the autonomous existence of the aboriginal entity differ only in the degree to which aboriginal self-government should be recognized within Confederation.

Footnotes

1. (1823), 8 Wheat. 543.

2. Ibid., per Marshall, C.J., p. 573

3. Worcester v. State of Georgia (1832), 6 Peters 515 (U.S.S.C.) at 544 (judgment of Chief Justice Marshall).

4. Smith, "The Concept of Native Title" (1974), 24 U. of T. Law Journal 1, at 2.

5. Johnson v. M'Intosh, supra, at 590.

6. Ibid., at 587.

7. (1885), 10 O.R. 196 (Ont. C.A.); affirmed (1886), 13 O.A.R. 148 (C.A.); affirmed (1887), 13 S.C.R. 577; affirmed (1889), 14 App. Cas. 46 (P.C.).

8. Brian Slattery, "The Land Rights of Indigenous Candian Peoples," Ph.D. Thesis, Oxford, 1979, at 350, 357.

9. (1887), 13 S.C.R. 577, per Henry J., at 639-40; per Taschereau J., at 648-9.

10. (1888), 14 A.C. 46 (P.C.), at 54 per Lord Watson.

11. Ibid., at 55. A plenum dominium is defined as: "Full ownership; the property in a thing united with the usufruct." H. Black, Black's Law Dictionary. (4th ed., West Publishing Co., St. Paul: 1951) p.1314.

12. (1973), 34 D.L.R. (3d) 145 (S.C.C.).

13. Ibid, per Hall, J., at 173-4.

14. Of the seven judges who heard the case, Hall, Laskin and Spence J.J. held that the Nishgas were entitled to the declaration they sought. Ritchie, Judson and Martland J.J. held they were not, and concurred with Pigeon J. who dismissed the appeal on a procedural matter with no mention of the issue of aboriginal title.

15. Peter A. Cumming and Neil H. Mickenberg, Native Rights in Canada, (Toronto: Indian - Eskimo Association of Canada, 1972) at 30.

16. "And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid; "Royal Proclamation of 1763, R.S.C. 1970, Appendices, at pp. 127-29.

17. See Calder v. Attorney-General of B.C. (1971), 13 D.L.R. (3d) 64, (1970), 74 W.W.R. 481 (B.C.C.A.); Regina v. White and Bob (1965), 50 D.L.R. (2d) 613, at p.619, 52 W.W.R. 193, at p.199; Regina v. Sikyea (1964), 43 D.L.R. (2d) 150, 46 W.W.R. 65 (N.W.T.C.A.), affirmed, [1964] S.C.R. 642.

18. Michael Asch, Home and Native Land (Toronto: Methuen Publications) 1984, at pp. 57-8.

19. R.S.C. 1970, Appendix 8.

20. Ibid., Appendix 9.

21. 42 Victoria, ch. 31.

22. Ibid., Appendix 10.

23. Royal Proclamation of 1763, R.S.C. 1970, Appendices, at pp. 127-129.

24. Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, [1979]3 C.N.L.R. 17 at 45 (F.C.T.D.).

25. Ibid., at 48.

26. (1967), 180 Ct. Cl. 375 (U.S.Ct.Cl).

27. Ibid., at 384-5.

28. Ibid., at 385, 386.

29. Confederated Tribes v. United States (1966), 177 Ct. Cl. 184, at 194 (U.S.Ct.Cl.)

30. See Calder et al v. Attorney-General of British Columbia, supra, per Hall J., at 174-5; Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, supra, at 49.

31. Amodu Tijani v. Secretary Southern Nigeria, [1921] 2 A.C. 399 (P.C.), at 409.

32. St. Catharine's Milling and Lumber Co. v. The Queen (1885), 10 O.R. 196 (Ont. C.A.), at 209. (1889), 14 A.C. (P.C.) at 54.

33. Johnson v. M'Intosh, supra, at 602.

34. Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, supra, at 50.

35. St. Catherine's Milling and Lumber Co. v. Queen supra, per Ritchie, C.J., at 577.

36. Ibid, at 54.

37. Calder v. Attorney General of B.C., supra, at 173-4.

38. Black's Law Dictionary, 11th ed. (St. Paul: West Publishing Co., 1951) at 1712.

39. [1921] 2 A.C. 399 (P.C.), at 409.

40. Ibid., p. 407.

41. Calder et al v. Attorney General of B.C., supra, at 156.

42. (1823), 8 Wheat. 543, at 593.

According to Chief Justice Marshall, Title acquired from the Indians was

> "...dependent on their laws. The grant derives its efficacy from their will...The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws."

43. [1921] IA.C. 21.

44. Ibid., per Duff, J., at 408.

45. November 1, 1984 judgement of the Supreme Court of Canada (Not yet reported) The majority decision was delivered by Mr. Justice Dickson (as he then was), on behalf of Beetz, Chouinard, and Lamer, JJ.

46. Ibid., per Dickson, J. at 24.

47. Ibid., at 29-30.

48. Ibid., at 30-31.

49. Ibid., per Dickson J., at 31.

50. In Re Southern Rhodesia, [1919] A.C. 211, at 233-5 (P.C.); Amodu Tijani v. Secretary, Southern Nigeria, supra, note 26, at 407-10; Calder et al. v. Attorney-General of British Columbia, supra, at note 10, per Hall, J., at 174, 208-11.

51. Lynn Niedermeier, "Aboriginal Rights : Definition or Denial?" (1981) 6 Queen's Law Journal 568, at 569.

52. Michael Asch, Home and Native Land (Methuen Publications : Ontario) 1984, at 28.

53. Ibid., at 27-8.

> "Our position is that aboriginal rights, aboriginal title to land, water and sea ice flows from aboriginal rights and all rights to practise our customs and traditions, to retain and develop our languages and cultures, and the rights to self-government, all these things flow from the fact that we have aboriginal rights....In our view, aboriginal rights can also be seen as human rights, because these are things that we need to continue to survive as a distinct peoples in Canada." (John Amagoalik, co-chairperson of the Inuit Committee on National Issues)
>
> "What we feel is that aboriginal title or aboriginal right is the right to collective ownership of land, water, resources, both renewable and non-renewable. It is a right to self-government, a right to govern yourselves with your own institutions, whichever way you want your institutions to run; the right to language, to culture, the right to basically practice (sic) your own religion and customs, the right to hunt, trap and fish and gather are certainly part of that, but it is not all of it." (Clem Chartier, Metis National Council).

54. Ibid., at 32.

55. Statement by the Metis National Council (1983), Ibid., at 35.

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